

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



SEIU, LOCAL 1997,

Charging Party,

v.

COUNTY OF RIVERSIDE,

Respondent.

Case No. LA-CE-40-M

PERB Decision No. 1825-M

March 1, 2006

Appearance: Tom Prescott, Senior Employee Relations Representative, for County of Riverside.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by the County of Riverside (County) to an administrative law judge's (ALJ) proposed decision. The unfair practice charge alleged that the County violated the Meyers-Milias-Brown Act (MMBA)¹ by unilaterally changing a policy concerning the processing of pending grievances that were also the subject of unfair practice charges at PERB, without providing SEIU, Local 1997 (SEIU) with notice and an opportunity to bargain.

We have reviewed the entire record including, but not limited to, the unfair practice charge, the transcript of the formal hearing, the post-hearing briefs, the proposed decision, and the County's exceptions. We find that the ALJ's proposed decision cannot be adopted as written. We therefore adopt the following as the decision of the Board itself.

¹MMBA is codified at Government Code section 3500, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

At all times relevant to this dispute, Margaret Turk (Turk) was a Senior Appraiser in the Riverside County Assessor's Office. Turk sought to promote to the position of Supervising Appraiser.

The County operates under a merit system for personnel actions. The County's current system for promotional opportunities does not involve the more typical procedure of a posting followed by solicitation of applications. Rather, employees interested in promoting must have on file a resume in the County's central resume bank, called Resumix. When an opening occurs, the hiring department submits a requisition to the human resources office, which in turn prepares a list of eligible candidates for the hiring department.

On December 13, 2001, the human resources department issued a list of eligibles to the Assessor's Office for the position of Supervising Appraiser. The list contained 29 names, including Turk's, but the County never offered Turk an interview.

On January 18, 2002, Turk filed a grievance alleging the County failed to interview her for the Supervising Appraiser position in violation of Article VI, Section 5 of the parties' Memorandum of Understanding (MOU). Section 5 provides, in relevant part:

Merit Systems/Veterans Preference. The Human Resources Administration under the Memorandum is designated a merit system. Appointments, promotions, demotions, transfers and dismissals shall be made on the basis of merit and ability. Each officer shall appoint all necessary employees allowed for their department by this Memorandum only from among persons certified to them by the Human Resources Director as eligible for the respective positions. The Human Resources Director shall determine the methods of evaluating the qualifications of applicants. The methods shall be practical in nature and may involve any combination of written test, oral test, performance test, rating of education, training and experience and shall take into consideration a system of veterans preference as may be adopted by the Board of Supervisors, by resolution.

Article XIII, Grievance Procedure, Section 2, defines a grievance as follows:

A 'grievance' is the subject of a written request or complaint, which has not been settled as a result of the discussion required by Section 1, initiated by an employee or the Union on behalf of a specifically named employee or group of employees arising out of a dispute by an employee or group of employees concerning the application or interpretation of the specific terms and conditions set forth in this Memorandum of Understanding

Section 2 goes on to exclude "all other matters" from the grievance procedure and sets forth four specific examples.² There appears to be no argument by the County that this particular exclusionary language applies to the issue of promotional decisions made on the basis of merit and ability.

In addition, boilerplate language following the Human Resources Department eligibles list entered into evidence by the County states, in relevant part:

Departments are mandated by County policy to interview all candidates on the certification list. Interview results indicating the interview status of each candidate must be returned to the above named recruiter

However, on January 23, 2002, the County rejected the grievance "because the issue is not a grievable matter."

As a result, on February 13, 2002, SEIU filed an unfair practice charge alleging that the County refused to process a grievance related to a promotional examination thereby repudiating its obligation under the terms of the parties' negotiated grievance procedure.

During a re-opener of the MOU in 2002, the parties agreed to new contractual language to address the issue of grievability. The agreed upon language was adopted in early June 2002

²For example, these include matters reviewable under some other County administrative procedure, that require legislative action as a remedy, disciplinary actions reviewable under the merit system, or not reviewable because they involve termination of a probationary employee, and matters relating to evaluations where the overall rating is satisfactory or better.

and added a new section 13 entitled Grievance Resolution to Article XIII - Grievance

Procedure to the MOU. The new language reads:

SEIU and the County will meet on issues of grievability of the SEIU grievances that are currently the subject of Unfair Labor Practice charges. If the parties agree that any particular grievance is grievable, it will be entered into the grievance process. In the event there is no agreement on a particular grievance, SEIU may continue to pursue resolution of that grievance through PERB.

With respect to whether issues are grievable, the County and SEIU agree to utilize representatives from the State Mediation and Conciliation Service to settle questions of grievability and comply with their decisions on grievability. Both parties will abide by the Mediator's decision.

For prospective grievances, the County agrees to cite specific reasons, including any applicable Articles or Sections of the MOU, or specific provisions or other procedures, that constitute the County's rationale for rejection of the grievance. The Union, by this agreement, does not waive any of its rights to file grievances, unfair practice charges or other means to enforce the MOU in the future. The parties agree to meet in an attempt to resolve any future denials upon the request of the Union.

The first meetings contemplated by this new language were held approximately six to eight months later or December 2002 to February 2003. SEIU presented approximately seven to ten pending grievances, not including the Turk grievance, with grievability issues to the County and proposed sending them through the grievance procedure or to State Mediation and Conciliation Service as indicated in the newly negotiated language. The County rejected the proposals. SEIU then concluded that meeting on the Turk grievance would not be fruitful.

On September 26, 2003, following the investigation of the charge, the General Counsel of PERB issued a complaint. The complaint alleges that the County unilaterally changed a policy concerning pending SEIU grievances that were the subject of unfair practice charges as described in Article XIII, Section 13 of the parties' collective bargaining agreement by

refusing to utilize the State Mediation and Conciliation Service to determine the grievability of the grievance of Turk.

An informal conference was held on November 7, 2003, but the matter was not resolved. The formal hearing was conducted by ALJ Donn Ginoza on February 10, 2004.

In their closing brief, the County argues that the newly negotiated Article XIII, Section 13 language does not apply retroactively and the Turk grievance was filed before the adoption of the newly negotiated language. Therefore, Article XIII, section 13 does not apply to the Turk grievance. Furthermore, the County indicates that SEIU never requested the Turk grievance be referred to the State Mediation and Conciliation Service for resolution of the grievability issue. Therefore, the County cannot have denied moving the Turk grievance to State Mediation and Conciliation Service for resolution of the grievability issue.

SEIU argues that the subject of Turk's grievance is a mandatory subject of bargaining. In support, SEIU cites a recent PERB decision, County of Riverside (2004) PERB Decision No. 1577-M (Riverside), wherein the Board found that the County was contractually bound to process grievances in reference to promotion. SEIU asserts that the County's refusal to process the Turk grievance is a repudiation of the grievance procedure and a refusal on the County's part to negotiate in good faith.

ALJ'S DECISION

The ALJ determined that the newly negotiated language was not retrospective and therefore the County was not obligated to refer the Turk grievance to State Mediation and Conciliation Service. As a consequence, a request by SEIU to proceed with the Turk grievance/unfair practice charge under the newly negotiated language would have been futile.

The ALJ then reframes the issue, as SEIU originally alleged in the unfair practice charge but not the issue found in the complaint: whether the County repudiated its policy of

processing grievances under the policy that existed prior to the June 2002 amendment. The ALJ rejects the County's claim that SEIU can prevail only by proving the allegations of the PERB complaint. And although SEIU did not move to amend the complaint during the hearing, PERB is permitted to entertain Unalleged violations. Finding the Unalleged violation requirements meet, the ALJ determined the County refused to process the Turk grievance as required by PERB precedent in Riverside.

COUNTY'S EXCEPTIONS

The County excepts to the proposed decision based upon five issues, articulated as follows:

1. The ALJ erred in framing the issue of the case. The ALJ ignored the specific allegations raised in the complaint. The reframed issue was previously litigated in Riverside.³
2. The ALJ erred in entertaining Unalleged violations. The four requirements are not met. Most importantly, the County did not have adequate notice and opportunity to defend against the Unalleged violations.
3. The ALJ erred in not dismissing the complaint. SEIU failed to prove a prima facie case of unilateral change.
4. The ALJ erred by not deciding the issue outlined in the complaint. There has been no determination as to whether the County committed a unilateral change as described in the complaint.
5. The ALJ erred in ordering a remedy that was moot. Under Riverside, the County is already obligated to process the Turk grievance.⁴

³The proposed decision asks whether the County refused to process the failure to interview grievance of Turk. In Riverside, the Board found the County refused to process the failure to promote grievance of Carmela B. MacArther in violation of the MMBA. In our view, the cases are distinct. Therefore, we disagree that the proposed decision reframed an issue previously litigated in Riverside.

⁴See footnote 3. The Riverside decision is instructive, but not determinative as to the outcome of this case. Furthermore, if the County's assertion is correct and Riverside is binding, then the County should have begun processing the Turk grievance when the Riverside decision was issued on December 31, 2003. For reference, the County's exceptions were filed with the Board on June 1, 2004.

DISCUSSION

On February 13, 2002, SEIU filed the instant unfair practice charge alleging that the County refused to process a grievance related to a promotional examination thereby repudiating its obligation under the terms of the parties' negotiated grievance procedure. But on September 26, 2003, following an investigation, PERB issued a complaint alleging the County unilaterally changed a policy concerning pending SEIU grievances that were the subject of unfair practice charges as described in Article XIII, Section 13 of the parties' collective bargaining agreement by refusing to utilize the State Mediation and Conciliation Service to determine the grievability of the grievance of Turk. The two allegations are clearly different. We can only assume then that the Board agent knew about the newly negotiated language between the parties, adopted in June 2002, and believed the current unfair practice to be as stated in the complaint.

Therefore, we agree with the County's first exception: the ALJ erred in framing the issue of the case. Based upon the complaint, the issue before us is a narrow one. Does the newly negotiated language adopted in June 2002 apply retroactively to pending grievances and unfair practice charges, more specifically, the Turk grievance? And if so, did the County unilaterally refuse to adhere to the newly adopted language, as applied to the Turk grievance?

We find paragraphs one and two of the newly negotiated language to be retroactive. In June 2002, the parties met to negotiate, and hopefully provide clarity on issues of grievability. The newly negotiated language is replete with references that indicate the language is to be applied retroactively, or in other words, to previously filed grievances now pending.⁵

⁵Article XIII, Section 13, paragraph 1 reads:

SEIU and the County will meet on issues of grievability of the
SEIU grievances that are currently the subject of Unfair Labor

Furthermore, paragraph three of the newly negotiated language specifically identifies procedures for prospective grievances, making an easy comparison to the above paragraphs as being applicable to grievances of a different kind.⁶ In addition, the parties met in December 2002 to February 2003 about pending grievances, as directed by the newly negotiated language thereby manifesting the intent that the language be construed as retroactive. Clearly, the parties understood the language to be retroactive. To argue otherwise now is merely an attempt to escape the consequences of the pending unfair.

That said, we turn to the County's third and fourth exceptions: the ALJ erred in not dismissing the complaint because SEIU failed to prove a prima facie case of unilateral change, and the ALJ erred by not deciding the unilateral change issue outlined in the complaint. We do that now and ask whether the County unilaterally changed the policy bargained for in June 2002. In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),⁷ PERB utilizes either the "per se" or "totality of the conduct" test,

Practice charges. If the parties agree that any particular grievance is grievable, it will be entered into the grievance process. In the event there is no agreement on a particular grievance, SEIU may continue to pursue resolution of that grievance through PERB. (Emphasis added.)

⁶Article XIII, Section 13, paragraph 3 reads:

For prospective grievances, the County agrees to cite specific reasons, including any applicable Articles or Sections of the MOU, or specific provisions or other procedures, that constitute the County's rationale for rejection of the grievance. The Union, by this agreement, does not waive any of its rights to file grievances, unfair practice charges or other means to enforce the MOU in the future. The parties agree to meet in an attempt to resolve any future denials upon the request of the Union. (Emphasis added.)

⁷PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)⁸ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

On or about June 2002, the parties negotiated a policy to resolve issues of grievability. In December 2002 to February 2003, SEIU presented approximately seven to ten pending grievances, not including the Turk grievance, with grievability issues to the County and proposed sending them through the grievance procedure or to State Mediation and Conciliation Service as indicated in the newly negotiated language. The County rejected the proposals. SEIU then concluded that meeting on the Turk grievance would not be fruitful. We agree.

Given the ongoing struggle between the parties to find agreement on issues of grievability, attempting to send seven to ten grievances through the newly negotiated process to resolve grievability issues and being denied makes another request on a similar grievance futile. Based on the facts, the County unilaterally repudiated its newly negotiated language when it refused to refer any pending grievances to State Mediation and Conciliation Services for determination of the grievability of the subject matter of the grievance.

⁸When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Finally, we agree with the County's second exception: the ALJ erred in entertaining Unalleged violations. We find no compelling reason to entertain Unalleged violations in this case. Should it become necessary to entertain Unalleged violations, the rationale must be clearly articulated in the decision. In this case, the ALJ simply identifies the four requirements necessary to discuss Unalleged violations and then asserts that the requirements are met. We find this to be woefully insufficient. Each one of the requirements must be fully discussed to provide a clear rationale for discussing issues not found in the complaint. If SEIU found the complaint to be insufficient, they should have moved to amend it prior to hearing. Unless the Unalleged violations requirements are met, the parties are bound by the language of the complaint.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Riverside (County) violated the Meyers-Miliias-Brown Act (MMBA), Government Code section 3505 and California Code of Regulations, title 8, section 32603(a), (b), and (c), by unilaterally changing a negotiated policy, Article XIII, Section 13, of the parties Memorandum of Understanding, addressing the process to resolve disagreements over the grievability of issues without providing Service Employees International Union, Local 1997 (SEIU) with prior notice and opportunity to bargain.

Pursuant to Government Code sections 3509(a) and 3541.5(c), it is hereby ORDERED that the County, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with SEIU regarding a change in policy affecting matters within the scope of representation;

2. Unilaterally changing Article XIII, Section 13, dealing with the process to resolve disagreements over the grievability of issues without giving SEIU prior notice and opportunity to bargain;

3. Failing and refusing to process grievances regarding interviews, including the grievance filed by SEIU on behalf Margaret Turk on January 18, 2002, pursuant to the parties' agreed-upon grievance procedures.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within ten (10) workdays, following the date this decision is no longer subject to appeal, process the grievance filed by SEIU on behalf of Margaret Turk filed on January 18, 2002, and process all other grievances filed by SEIU regarding interviews, pursuant to the parties' agreed-upon grievance procedures including, but not limited to, Article XIII, Section 13, of the parties' Memorandum of Understanding;

2. Post copies of the Notice to Employees attached hereto as an Appendix, signed by an authorized agent of the County, at all work locations where notices to employees are customarily posted. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material;

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General

Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Chairman Duncan joined in this Decision.

Member Shek's concurrence begins on page 13.

SHEK, Member, concurring: I respectfully concur with the conclusion of the Public Employment Relations Board's (PERB or Board) majority opinion that the County of Riverside (County) unilaterally changed the policy under Article XIII, section 13 of the parties' Memorandum of Understanding (MOU), by rejecting SEIU, Local 1997's (SEIU) proposal to submit pending grievances which were "currently the subject of Unfair Labor Practice charges," to the State Mediation and Conciliation Services for settlement of the question of grievability, but based on a different rationale.

I also concur with and therefore adopt those portions of the administrative law judge's (ALJ) proposed decision finding that the County unilaterally repudiated its policy regarding the processing of grievances pertaining to promotions, pursuant to Article VI, Section 5, "Merit Systems/Veteran Preference," and Article XIII, "Grievance Procedures," Section 2 of the MOU, subject to the comments stated below.

FINDINGS OF FACTS

I agree with, and supplement the majority's Background discussion with the following extract from the Findings of Facts of the proposed decision:

County Employee Relations Representative Jim Caves testified that the County has for many years maintained the prerogative of rejecting grievances as not raising any grievable matter. With regard to grievances involving personnel transactions, the County has consistently rejected grievances on this ground, where a grievant is challenging a decision declining to select him or her for an open position. Caves claimed that so long as the employee selected had been on the list of eligibles there would be no grounds for a grievance by a non-selected employee.

The parties agreed that they have had a longstanding dispute about the County's 'practice' of rejecting grievances in this manner and on these grounds.

Caves further testified that the County maintains no requirement that all employees on the eligibles list be interviewed. The

eligibles list is not a ranked list, and there are therefore no rules pertaining to use of rank in selecting candidates from the list. However, Caves was contradicted by boilerplate language in the eligibles list entered into evidence by the County, which states, following the listing of candidates:

'Departments are mandated by County policy to interview all candidates on the certification list. Interview results indicating the interview status of each candidate must be returned to the above named recruiter normally within 10 business days from the date of certification. Should the department decide to withdraw from the hiring for the specific position stated on this certified list, all documentation will be returned to the recruiter. Additional requests for certified candidates for this position will not be processed until all documentation is completed and returned to the Human Resources Department.

An employment offer may be made from a previous list without [re-interviewing], providing the following guidelines are followed: (1) The offer is made within 3 months of the list date, (2) The position offered is for the same classification, interviewer and location, (3) The candidate previously interviewed is still available. Failure to follow these guidelines may result in a delay in process of the new employee.' (Emphasis in original.)

The eligibles list has two columns to the right of the candidates' names with the heading 'Interview Results.' The first column is titled 'Action' and the second is 'Status.' At the bottom of each page of the listing is a legend bearing abbreviations for actions or status. For example, the following pertinent initials are set forth for 'Interview Action Codes': 'I' ('Interviewed') and 'NI' ('Not Interviewed'). Under 'Interview Status Codes' the following appear: 'A' ('Selected/Offered') and 'NS' ('Not Selected'). Other codes listed, which are found entered in the 'Action' column, include: 'DW' ('Declined Interview (Waived)'), 'DA' ('Did Not Appear for Scheduled Interview'), 'FR' ('Failed to Reply'), and 'PI' ('Previously Interviewed for Same Position'). The supervising appraiser list had handwritten entries for each of the 29 candidates in the 'Action' column. For roughly half of the candidates, an entry appeared in the 'Status' column as well.^[1]

¹The list for the supervising appraiser's position was entered into evidence. It contains a notation that Turk was interviewed. Caves had no independent knowledge whether that notation was accurate. On the basis of the grievance itself, Turk contends otherwise.

In the negotiations that led to the 2000-2004 MOU, SEIU raised concerns about the County's practice of rejecting grievances. No resolution was reached on this issue.

I respectfully disagree with the majority's conclusion that the two allegations in the unfair practice charge and the complaint are "clearly different." I do not find that based on the complaint, the issues before us are limited to whether the newly negotiated contractual language of Article XIII, Section 13 were retroactive to pending grievances and unfair practice charges, including the Margaret Turk (Turk) grievance, and whether the County unilaterally refused to comply with the agreement.

The basic subject matter raised in this unfair practice proceeding is the County's refusal to process the grievance related to the promotion of Turk by rejecting it as a non-grievable issue. Despite repeated objections of SEIU, the County continuously refused to abide by its contractual obligation pursuant to Article VI, Section 5, "Merit Systems/Veteran Preference," and Article XIII, "Grievance Procedures," Section 2 of the parties' MOU.

SEIU filed the grievance in January 2002, and the unfair practice charge in February 2002. In its charge, SEIU sought a remedy from PERB compelling the County to process the grievance through the grievance process based on its merits, up to and including advisory arbitration, if necessary. Four months after the filing of the charge, the parties entered into an agreement to add Article XIII, Section 13, to their MOU, with the new contractual language concerning submitting disputed issues of grievability to the State Mediation and Conciliation Service.

A complaint was subsequently issued. It is evident from the language of the complaint that the Board agent intended to incorporate by reference the issues raised in the grievance and the initial charge. The complaint alleged, in part:

4. On or about June 25, 2002, Respondent changed this policy by refusing to utilize the State Mediation and Conciliation Service to determine the grievability of the grievance of Margaret Turk. That grievance is the subject of this unfair practice charge. (Emphasis added.)

The above-quoted paragraph of the complaint addresses a bi-furcated issue, more specifically: (1) the determination of the grievability of Turk's grievance that is "currently the subject of a unfair labor practice charge by utilizing the State Mediation and Conciliation Service; and (2) the processing of Turk's grievance that is the subject matter of the underlying unfair practice charge. The allegations raised in the complaint are inclusive of the issues raised in the charge. The two allegations are therefore not different.

I find compelling reason to entertain the Unalleged violations in this case. The record supports the ALJ's finding that the issue of whether the County repudiated its policy of processing grievances under the policy that existed prior to the June 2002 amendment can be addressed as an Unalleged violation. As stated in Hacienda La Puente Unified School District (1997) PERB Decision No. 1187, at p. 3:

In Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara USD), the Board stated that an Unalleged violation can be considered only if it is intimately related to the subject matter of the complaint, is part of the same course of conduct, has been fully litigated, and the parties have had the opportunity to examine and be cross-examined on the issue. The failure to meet any of these conditions prevents the Board from considering an Unalleged violation. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

In the present case, both the grievability of the grievance and the grievance itself are included as the subject matter of the complaint, and are therefore intimately related. Both allegations are based on the same course of action involving the County's rejection of Turk's grievance. Both issues have been fully litigated during the hearing. An examination of the

hearing transcripts show that witnesses for SEIU and the County were both given the opportunities to offer direct testimony and be cross examined on the grievance procedures that existed at the time of the filing of Turk's grievance on January 18, 2002, and the processing of the grievance. In resolving the issue of Unalleged violations, I find the following ALJ's statement in the proposed decision to be most instructive: "I amend the complaint to conform to proof."²

I therefore adopt those portions of the Conclusions of Law in the proposed decision concerning the processing of the Turk grievance pursuant to the Merit and Grievance Procedures of the MOU that existed at the time of the filing of the initial grievance and charge, as follows:

An employer's implementation of a unilateral change in subjects within the scope of representation constitutes a 'per se' violation of the duty to bargain in good faith, under well-settled case law precedent prior to PERB's assumption of jurisdiction over MMBA, as well as under PERB precedent thereafter. (Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; San Joaquin Co. Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.) A prima facie violation for a unilateral change is demonstrated where (1) the employer implements a change in policy concerning a matter within the scope of representation and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Grant Joint Union High School District, *supra*, PERB Decision No. 196.)

An employer's refusal to process grievances has been held to constitute a violation of the duty to bargain, applying the analysis of unilateral changes. (Anaheim City School District (1983) PERB Decision No. 364, see also Los Angeles Unified School District (1984) PERB Decision No. 440; Independent Stave Co.

²Proposed decision, p. 12.

(1980) 248 NLRB 219 [103 LRRM 1480]; Kolman Div. of Athey Products Corp. (1986) 282 NLRB 203 [123 LRRM 1343].)

SEIU contends that the County's denial of the Turk grievance 'was in effect a repudiation of the grievance procedure,' and as such was bad faith bargaining on the County's part. SEIU asserts that '[t]he grievance procedure in large part is a bargaining process that is utilized by both parties to ensure compliance with the Memorandum of Understanding.' SEIU relies on County of Riverside (2003) PERB Decision No. 1577-M (County of Riverside), which held that the County's refusal to process a grievance under similar circumstances constituted a unilateral repudiation of the grievance procedure.

In its post-hearing brief, the County does not defend against the claim of unilateral repudiation of the grievance procedure as a result of the refusal to process the Turk grievance, but instead focuses on the theory of the case as alleged in the PERB complaint. The County seizes on the language of the complaint, which alleges that it violated the MMBA by unilaterally repudiating the provisions requiring submission of grievability issues to the State Mediation and Conciliation Service. Proceeding from this premise, the County argues that nothing in the language of the new provisions suggests retroactive applicability and that, in any event, SEIU failed to offer evidence that it attempted unsuccessfully to invoke the mediation service as to the Turk grievance.

Turk's grievance was filed in January 2002. Her unfair practice charge was filed shortly thereafter, in February 2002. At the time Turk filed her grievance and it was rejected, the language concerning submitting disputed issues of grievability to the State Mediation and Conciliation Service had not been added. That language was added as a result of the June 2002 negotiations.

I agree with the majority opinion that provisions of the newly negotiated Article XIII, Section 13, are intended to be applied retroactively, but only to the extent that the parties will meet to determine the grievability of any grievances that are "currently the subject of Unfair Labor Practice charges," and that the State Mediation and Conciliation Service will be utilized to settle any grievability questions. It would have been futile for SEIU to meet with the County concerning the grievability of Turk's grievance, considering the County had already

rejected to process her grievance, rejected to send seven to ten pending grievances with grievability issues to the State Mediation and Conciliation Service, and rejected a similar type of grievance in County of Riverside (2003) PERB Decision No. 1577-M. There is no evidence to show that Article XIII, Section 13 is intended to replace Article VI, Section 5, of the parties' MOU³ that was in effect at the time of the filing of the Turk's grievance on January 18, 2002. Article VI, Section 5 provides that promotions shall be based on "merit and ability," which is evaluated based on methods that are "practical in nature," such as oral or performance test. Although interview is not one of the specific evaluation methods listed, it can arguably be interpreted as a method that is "practical in nature." Pursuant to Article XIII, "Grievance Procedure," Section 2, the "application or interpretation of the specific terms and conditions set forth in this Memorandum of Understanding" is a subject for grievance. The County should therefore resolve, rather than reject, Turk's grievance that she was denied an interview pursuant to the Merit System and Grievance Procedures of the MOU. I therefore adopt the following portions of the Conclusions of Law of the proposed decision:

Article VI, section 5, of the parties' MOU provides that 'appointments, promotions, demotions, transfers and dismissals' shall be made on the basis of 'merit and ability.' The Turk grievance alleged that the County failed to base its decision on 'merit and ability' when denied her an interview. In a case involving the same parties and facts indistinguishable from those here, PERB upheld the administrative law judge's finding that the County's refusal to process a grievance alleging an employee's complaint that she had been denied a promotion constituted an unlawful unilateral change. (County of Riverside.) SEIU had claimed that the employee was denied a promotion on grounds that the appointing officer had either given insufficient weight to

³ Article V, Section 5, of the parties' MOU providing that "appointment, promotions, demotions, transfers and dismissals" shall be made on the basis of "merit and ability;" and that "The Human Resources Director shall determine the methods of evaluating the qualifications of applicants. The methods shall be practical in nature and may involved any combination of written test, oral test, performance test, ..."

her training and experience for the position or that the County had not given the employee adequate training for the position. (Ibid.) PERB rejected the County's argument that SEIU had contractually waived its right to grieve the issue of promotions generally, through the MOU's language recognizing the merit system, and specifically, through the appointing officer's discretion to select among individuals certified as eligible by the human resources director. (The latter argument was reiterated by Caves in this case.) The language purporting to constitute a waiver was deemed insufficient to demonstrate the 'clear and unmistakable' standard for waiver with respect to the issue of grievability of promotions generally. (Ibid.) PERB cited the language in article V, section 5, requiring that promotions be made upon 'merit and ability,' as evidencing a ground upon which a grievance could be lodged. (Ibid.) PERB also rejected the claim that SEIU had failed to demonstrate more than an 'isolated breach' of the MOU, as opposed to a change in policy having a generalized effect or continuing impact on bargaining unit employees. (Ibid.)⁴

I am bound by this controlling precedent. The County has provided no argument as to why County of Riverside is distinguishable from the instant case. In effect, this case demonstrates that the County continues to maintain its position that it may reject grievances of the kind filed by Turk. The position that grievances raising issues arising out of the promotional process are not grievable (or that the County has discretion not to process such grievances) was found in County of Riverside to have constituted a repudiation of the policy of processing grievances as defined in the parties' negotiated grievance procedure.

Accordingly, I find that the County had a policy of processing grievances alleging violations of article VI, section 5, pertaining to "appointments, promotions, demotions, transfers and dismissals" and that the County unilaterally repudiated that policy

⁴PERB also denied the County's request for reconsideration of PERB Decision No. 1577-M. (County of Riverside (2004) PERB Decision No. 1577a-M.) In the subsequent matter, the Board emphasized that whether or not the County had a past practice of processing grievances pertaining to promotions is irrelevant. The unilateral change violation found in PERB Decision No. 1577-M is premised on the County's repudiation of its obligation to process grievances over promotions arising from the express provisions of the MOU.

on or about January 23, 2002, when it refused to process the Turk grievance. I amend the complaint to conform to proof. This conduct violated section 3505 of the MMBA and PERB Regulation 32603(c). I find that by the same conduct the County also denied SEIU its right to represent bargaining unit employees, thereby violating section 3503 of the MMBA and PERB Regulation 32603(b). In addition, I find that by the same conduct the County interfered with Turk's right and the right of other bargaining unit members to participate in an employee organization of their own choosing, thereby violating section 3506 of the MMBA and PERB Regulation 32603(a).

REMEDY

I would add the following remedy to the majority opinion.

Pursuant to section 3509(a), the PERB under section 3541.3(i) is empowered to:

". . . take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter."

The County has violated section 3505 of the MMBA and PERB Regulation 32603(c) by unilaterally repudiating its contractual obligation to meet on the issue of grievability of the SEIU grievance related to the denial of a promotional interview to Turk, that is currently the subject of an unfair labor practice charge, and if necessary, to process the grievance. The appropriate remedy in such cases is to require the County to rescind the policy change and cease and desist from implementing any unilateral change.

PERB has found that purposes of the statutes it administers are not effectuated by a remedy that fails to take into account the existence of a negotiated agreement between the parties that addresses the "basic subject matter" raised in the unfair practice proceeding and that is made prior to PERB's remedial order. (Rio Hondo Community College District (1983) PERB Decision No. 279a (Rio Hondo).) Thus, PERB may take into account such an intervening negotiated agreement or settlement in considering a remedy. (Rio Hondo).

Since the County and SEIU negotiated a procedure to deal with the grievability of disputes, such as the one that gave rise to the underlying unfair practice charge in this case, the County is ordered to meet with SEIU on the issue of grievability of the Turk grievance that is currently the subject of an unfair practice charge. If the parties agree that this particular grievance is grievable, it will be entered into the grievance process. If no agreement is reached, the County is ordered to utilize representatives from the State Mediation and Conciliation Service to settle questions of grievability and comply with their decisions on grievability. If the grievance is determined to be grievable by either one of the above-stated procedures, the County is ordered to process the Turk grievance.

Accordingly, as a result of the above-described violation, the County has interfered with the right of employees to participate in an employee organization of their own choosing in violation of section 3506 and PERB Regulation 32603(a), and denied SEIU its right to represent employees in their employment relations with a public agency in violation of section 3503 and PERB Regulation 32603(b). The appropriate remedy is to cease and desist from such unlawful conduct. (Rio Hondo.)

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the order. Such an order ordinarily is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the County to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such

notice effectuates the purposes of the MMBA that employees be informed of the resolution of this matter and the County's readiness to comply with the ordered remedy.

I concur with the order stated in the majority opinion, except to add that I would also order the County to cease and desist from interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing; and denying SEIU its right to represent employees in their employment relations with the County.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-40-M, SEIU. Local 1997 v. County of Riverside, in which all parties had the right to participate, and a review by the Board, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3505 and California Code of Regulations, title 8, section 32603(a), (b), and (c). (Cal. Code Regs., tit. 8, sec. 31001, et seq.) The County violated the MMBA by unilaterally changing a negotiated policy, Article XIII, Section 13, addressing the process to resolve disagreements over the grievability of issues without providing Service Employees International Union, Local 1997 (SEIU) with prior notice and an opportunity to bargain.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with SEIU regarding a change in policy affecting matters within the scope of representation;
2. Unilaterally changing Article XIII, Section 13, dealing with the process to resolve disagreements over the grievability of issues without giving SEIU prior notice and opportunity to bargain;
3. Failing and refusing to process grievances regarding interviews, including the grievance filed by SEIU on behalf of Margaret Turk on January 18, 2002, pursuant to the parties' agreed-upon grievance procedures.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within ten (10) workdays, following the date this decision is no longer subject to appeal, process the grievance filed by SEIU on behalf of Margaret Turk filed on January 18, 2002, and process all other grievances filed by SEIU regarding interviews, pursuant to the parties' agreed-upon grievance procedures including, but not limited to, Article XIII, Section 13, of the parties' Memorandum of Understanding.

Dated: _____ COUNTY OF RIVERSIDE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.